CC v NT Minister for Health and Community Services & Ors
[2005] NTSC 69

PARTIES:	CC v THE NORTHERN TERRITORY MINISTER FOR HEALTH AND COMMUNITY SERVICES and MICHAEL CAREY SM and J
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	APPEAL FROM THE FAMILY MATTERS COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	41 of 2005 (20504276)
DELIVERED:	2 November 2005
HEARING DATES:	20 October 2005
JUDGMENT OF:	RILEY J

CATCHWORDS:

FAMILY LAW AND CHILD WELFARE – PRACTICE AND PROCEDURE

Community Welfare Act 1983 (NT) s 44, s 47 – whether orders made in proceedings were irregular – whether s 44(1) permits adjournments for such periods not exceeding 14 days in total or for such periods not exceeding 14 days each – once the hearing is underway the matter may be adjourned as often as necessary, for periods not exceeding 14 days on any one occasion, pending finalisation of the hearing.

Community Welfare Act 1983 (NT) s 43, s 44, s 47

Trew v Minister for Family and Community Services of the Northern Territory [2005] NTSC 63, considered
Minister for Territory Health Services v LG (1998) 146 FLR 396 at 401, 403, applied

REPRESENTATION:

Counsel:

Plaintiff:	R. Goldflam
First defendant:	A.D. Young
Child:	A.R. Whitelum

Solicitors:

Plaintiff:	Northern Territory Legal Aid Commission
First defendant:	Mark Heitmann
Child:	Morgan Buckley

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

CC v NT Minister for Health and Community Services & Ors
[2005] NTSC 69
No 41 of 2005 (20504276)

IN THE MATTER OF the *Community Welfare Act*

BETWEEN:

CC
Plaintiff

AND:

THE NORTHERN TERRITORY MINISTER FOR HEALTH AND COMMUNITY SERVICES
First defendant

and

MICHAEL CAREY SM
Second defendant

and

J
Child

CORAM: RILEY J

REASONS FOR JUDGMENT

(Delivered 2 November 2005)

[1] The plaintiff is the mother of J who was born on 16 June 2004. J has a sister, K, who was born on 11 November 1997 and who has been in care under the provisions of the Community Welfare Act for some time. An application has now been made that the child J be declared in need of care under the terms of that Act. The application is opposed by the plaintiff.

[2] The matter is part-heard. The basis for the claim that J be declared in need of care is that the plaintiff suffers from a psychological condition which has been variously described but is referred to in written submissions on behalf of the Minister as a borderline personality disorder. Whatever may be the correct diagnosis, the claim is that the plaintiff has a longstanding pattern of aberrant behaviour which interferes with her parenting capacity. Her personality disorder is said to be intractable to treatment. The evidence suggests bizarre and dramatic attention-seeking behaviour on the part of the plaintiff which is said to impact upon the child. Examples of the behaviour are given in the course of the evidence but need not be repeated for present purposes. All of the evidence was received by the Family Matters Court and the hearing adjourned pending the receipt of written submissions. No findings have yet been made by the Family Matters Court in these proceedings.

[3] It is the submission of the plaintiff that some of the orders made in the proceedings were irregular and that, because of the failure to honour time constraints provided for in the Act, the proceedings are subject to a jurisdictional defect and orders in the nature of certiorari and prohibition

should be granted against the second defendant. A consequence of granting such relief is said to be that the child should immediately be returned to the care of the plaintiff, being the natural parent of the child.

History of the proceedings

[4] In order to understand the submission of the plaintiff it is first necessary to outline some of the history of the proceedings.

[5] The proceedings commenced with an application to the Family Matters Court at Alice Springs by the Minister seeking a declaration that J be found in need of care pursuant to s 35(1) of the Community Welfare Act. That application was filed on 17 February 2005. The matter came before the court on 23 February 2005 when an order was made adjourning the application to 9 March 2005. On 9 March 2005 a further order was made pursuant to s 44 of the Act adjourning the hearing to 23 March 2005. On that date the court made an interim order pursuant to s 47 of the Act that the custody and access of the child be at the discretion of the Minister. The application was then adjourned to 4 May 2005 by which time J was, by agreement between the parties, residing with his mother. On 4 May 2005 the orders were continued and the matter adjourned to 22 June 2005. However on 27 May 2005 the Minister removed the child from the mother's care and since that time the child has remained in foster care. On 22 June 2005 the matter was adjourned to the following day. On 23 June 2005 a limited hearing was conducted in order to determine the plaintiff's

submission that the child should be returned to her care on an interim basis pending the final hearing. Evidence was adduced by way of affidavit and other documents, and, at the conclusion of that hearing, the court made an order continuing the interim orders made on 23 March 2005 to 28 June 2005. On 28 June 2005 the court made the following observations and determination:

> "As stated earlier this is an interim application. I am satisfied that it is appropriate to deal with this application on the basis of the written material together with concessions made in submissions. On the basis of that material I am satisfied, taking into account the need to safeguard the welfare and development of the child that, pursuant to s 47 of the Community Welfare Act, the custody and access of the child is to be at the discretion of the Minister and for that order to continue until the next adjournment."

[6] The matter was adjourned to 6 July and then, on that date, further adjourned to 13 July 2005. On 13 July 2005 the interim orders made on 23 March 2005 were continued until 27 July 2005. On 27 July 2005 the matter was listed for hearing on 2 August 2005. On 2 August 2005 the hearing before the second defendant commenced and evidence was called. A further order was made that the plaintiff have access to the child on two occasions each week. The hearing was then adjourned until 12 September 2005.

[7] On 12 September 2005 the hearing continued. An order was made that access to the child be suspended but otherwise the existing orders were maintained. The hearing continued on 13, 14, 15 and 16 September 2005 with the evidence being completed during that period. On 16 September 2005 the court made an order pursuant to s 44(2)(b) that the child be placed

in the sole custody of the Minister. An order was made that the application be adjourned to 28 September 2005 for the receipt of written submissions. On 28 September 2005 the matter was further adjourned until 12 October 2005 and was then further adjourned to 26 October 2005 with the existing orders to continue.

[8] The proceedings in this Court were commenced on 18 October 2005. In the proceedings the plaintiff seeks: a declaration that the orders made on 9 March 2005 and any orders made after 22 July 2005 were ultra vires; an order in the nature of certiorari quashing the order of 12 October 2005; and orders in the nature of prohibition preventing the second defendant from making further orders under s 44 or s 47 of the Act. Further, the plaintiff seeks an order in the nature of mandamus that the child be returned to her forthwith. Other relief is sought against the Minister to restrain him from:

> "(a) taking the child into custody pursuant to section 11(1) of the Act;
>
> (b) applying for a holding order in relation to the child pursuant to sections 11(3)(b) and 11A of the Act; or
>
> (c) making a further application pursuant to section 35 of the Act that the child be found to be in need of care;
>
> pending the making of Orders pursuant to section 43 of the Act, by the second defendant, or the making of an Order dismissing the Application by the Second Defendant."

[9] Notwithstanding the wide range of relief sought, counsel for the plaintiff made it clear that "these proceedings turn on a short point of construction of s 44(1) of the Act". It is that issue of construction that I am asked to address.

The scheme of the Act

[10] The object of the Act is expressed to be "to provide for the protection and care of children and the promotion of family welfare and for other purposes". To achieve those ends the Act imposes obligations upon the relevant Minister and in exercising powers under the Act the Minister is required to "have as his or her main consideration the welfare of the child".

[11] The Act provides for what is to happen when the Minister, a member of the police force or other authorised person is of the opinion that a child is in need of care. One of the options available is to take the child into custody (s 11). When that occurs the person taking the child into custody is to notify the Minister of the action taken. The person is required to have the child held in a place of safety and must, not later than 48 hours after taking the child into custody, apply for a holding order. Such an order is to be made by a magistrate or registrar and is to authorise "the holding of the child in a place of safety" until a date specified in the order or 14 days after the day the child was taken into custody whichever first occurs (s 11A).

[12] The Minister, upon being notified, must assume responsibility for the care, protection and maintenance of the child and cause the child to remain in or be removed to a place of safety (s 17). The Minister is obliged to advise the court, before the expiry of the holding order, that he or she will not be making an application for an order that the child be found in need of care or, alternatively, shall make an application for an order that the child be found to be in need of care. The Minister must decide whether the child shall remain in the care of one or both of his or her parents or a guardian or some other person or whether some other arrangement may be made as to the placement of and provision of adequate care for the child.

[13] The Minister has authority to make an application to the court that the child be found to be in need of care (s 35). Such an application can also be made by another person after consultation with the Minister and with leave of the court. Before making such an application the Minister is to satisfy himself or herself that the welfare of the child would not be adequately provided for by some other means (s 36). In any hearing before the Family Matters Court for an order that a child be found to be in need of care the court is not bound by the rules of evidence and may inform itself on any matters it thinks fit (s 39). The burden of proving that a child is in need of care rests upon the Minister and the standard of proof is on the balance of probabilities (s 42). The matters to be considered by the court in such an application are set out in s 43 of the Act and the powers of the court are spelt out in s 43(4) in the following terms:

> "Subject to this section, the Court may, on the hearing of an application under this Part, make an order –
>
> (a) declaring the child in relation to whom the application is made to be in need of care; or
>
> (b) dismissing the application."

[14] Section 43(5) governs what orders may be made upon the making of a declaration that the child is in need of care.

[15] The overall intention of the legislature is abundantly clear. It is to enact a legislative regime that provides mechanisms to ensure that a child in need of care is provided with a suitable standard of care. In so doing, a child who is in need of protection may be taken into the custody of the Minister. The child is then to be held in a "place of safety" as defined in s 4(1) of the Act. The legislation enables immediate action to be taken to place the child in a place of safety and safeguards are then built in to the scheme by requiring that the person taking the child into custody apply for a holding order. This brings the matter before the courts.

[16] As was observed by Mildren J in *Minister for Territory Health Services v LG* (1998) 146 FLR 396 at 401:

> "Clearly the Act is designed for the protection and care of children who are in need of care. The Act gives important powers to police officers, hospital authorities, and the Minister to take appropriate steps to protect children who are believed to be in need of care, both before and after a court order is made. The focus of the Act is not upon the custody or guardianship of children generally but on the protection of children who are abandoned, maltreated or otherwise in need of the special protection of the State. It is clear also that the

> policy of the Act is that the State should only interfere when it is really necessary to do so. The rights of parents, who are the natural guardians of their children, are to be jealously protected because it is recognised that the aim of the intervention by the State should be not only to protect the child, but if at all possible, to return the child to its parents or other guardians."

The Family Matters Court

[17] The Community Welfare Act establishes the Family Matters Court which is constituted by a magistrate sitting alone. The Family Matters Court is to hear and determine all applications made under the Community Welfare Act. It is provided with guidance as to the exercise of its functions and with the power to make appropriate orders. By virtue of s 45, upon hearing an application the court may "require a person to furnish to it a report on the child in relation to whom the application is made". The child may be ordered to be interviewed and medically examined by a medical practitioner or by some other specified person. The resulting reports shall, unless the court otherwise directs, be made available to the parties.

[18] Section 47 of the Act permits the court to make interim orders. That section is in the following terms:

> "Where the Court thinks fit, it may make an interim order in accordance with this Part which shall include particulars of the date, time and place fixed by the Court for a further hearing of the application to which it relates and it shall remain in force –
>
> (a) subject to paragraph (b), for such period not exceeding 2 months, as the Court thinks fit; or

(b) where the Court thinks fit, for a further period not exceeding 4 months from the making of the first interim order."

[19] The powers provided to the court include the power to adjourn the hearing of an application and, in so doing, to make orders in relation to the child covering the period of the adjournment (s 44). It is this power considered in light of the power to make interim orders under s 47 that is the focus of the present application. The power to adjourn is found in s 44 of the Community Welfare Act and is in the following terms:

"44. Adjournment of proceedings, &c.

(1) The Court may adjourn the hearing of an application under this Part for such periods, not exceeding 14 days, as it thinks fit.

(2) During a period of adjournment under subsection (1), the Court shall, having received the recommendation of the Minister, direct that the child in relation to whom the application is made –

(a) live, or continue to live at home;

(b) be placed, or remain in, the custody of a person specified in the direction;

(c) live, or continue to live, in a place of safety specified in the direction; or

(d) be detained in a hospital specified in the direction.

(3) The person in charge of the place of safety or hospital specified in a direction under subsection (2) shall accept the child into his custody for the period of the adjournment.

(4) The Court may make such order as to costs of the care and maintenance of a child in relation to whom a direction under subsection (2) is made as it thinks fit."

[20] For present purposes it is important to bear in mind that s 44 of the Act and s47 of the Act address different circumstances. Section 47 permits the court to make interim orders "in accordance with this Act" where the magistrate may not yet have embarked upon the hearing. The power is wide in scope and encompasses the ability to make orders of the kind allowed for in both s 43 and in s 44. On the other hand, s 44 permits the making of short-term and temporary orders limited to those matters referred to in s 44(2) and covering the period of an adjournment of a hearing that is underway. As was observed by Mildren J in *Minister for Territory Health Services v LG* (supra at 403):

> "It is clear, however, that the kind of orders which can be made under s 44(2) are fairly limited. There is, for instance, no power to make an order of the kind contemplated by s 43(5)(a), or a guardianship order. Clearly the orders contemplated by ss 44(2) are very short-term temporary orders.
>
> On the other hand, orders contemplated by s 47, it seems to me, are intended to be not so confined. In the first place an interim order can be made for a period of up to two months and may be extended for a further two months. Obviously this is a longer period than is envisaged by s 44(1), and s 47 itself recognises that there is to be a further hearing of the application. One possible interpretation is that 'further hearing' envisages that the matter has already been part heard. This submission has some attraction, but I note that the expression used is 'a further hearing' rather than 'the further hearing'. I think that this suggests that the magistrate may not have yet embarked upon the hearing so as to become seized of the matter and that the word 'hearing' is not confined to a matter which is part heard in that sense but includes what might be called a preliminary hearing. Consequently it seems to me that the intention is that the

> court has a broader power to make orders than just the kind of orders referred to in s 44(2), as otherwise, s 47 would have little purpose."

See also *Trew v Minister of Family and Community Services of the Northern Territory* [2005] NTSC 63 at par [16].

[21] The original submission of the plaintiff was that s 44 of the Act permits just one adjournment of proceedings. That submission was not pressed in light of the use of the plural "periods" in s 44(2). The plaintiff also submitted that the section required that the total period of any adjournment or adjournments should not exceed 14 days. It was submitted that in circumstances where the court had adjourned the matter on numerous occasions and for a period longer than 14 days as in the present proceedings, any order made thereafter was ultra vires. Purporting to rely upon observations of Southwood J in *Trew v Minister of Family and Community Services of the Northern Territory* (supra), the plaintiff then submitted that the child J must be returned to his mother.

[22] Section 44 of the Community Welfare Act does not limit the number of adjournments that may be granted during the course of the hearing of an application under Part VI of the Act. Such is clear from the plain meaning of the words of s 44(1). By operation of that subsection the court may adjourn the application for such "periods" as it thinks fit. If the interpretation originally pressed by the plaintiff had been intended, the subsection would refer to "a period" rather than "periods". In addition in

subsection (2) the reference would be to "the period of adjournment" rather than "a period of adjournment".

[23] The further submission of the plaintiff is not so readily resolved. The issue as identified by the plaintiff is whether s 44(1) permits the Family Matters Court to adjourn the hearing of an application for such periods not exceeding 14 days in total (as the plaintiff contends) or for such periods not exceeding 14 days each (as the Minister contends). This is the "short point of construction" identified by the plaintiff. In support of its contention the plaintiff points to the clear concern of the legislation with ensuring that proceedings are dealt with expeditiously. The court is required to "endeavour to ensure that the proceedings are not protracted" (s 40). Time limits are imposed on many of the steps provided for under the Act. By way of example counsel referred to s 47 of the Act and noted that the effect of an interim order granted under that section cannot exceed the period of four months from the making of the first interim order thereby giving a clear outer time limit in relation to the effectiveness of such orders. It was submitted that if s 44(1) was interpreted to permit the granting of adjournments that went beyond a total of 14 days then the intention of the legislation in this regard may be thwarted. The submission of the plaintiff was that:

> "So at every stage there are time limits that have been set by the statute and to say that s 44 enables an indefinite number of 14 days' adjournments completely subverts that scheme."

[24] Reliance was placed upon observations made in *Trew v Minister of Family and Community Services of the Northern Territory* (supra), however those observations were made in the context of a consideration of the operation of s 47 of the Act and without addressing the specific impact of s 44(1) upon the legislative regime. Further, the observations were made without argument having been developed and were, in the circumstances, obiter dicta.

[25] The approach suggested by the plaintiff does not accord with a natural reading of the words of the section. In addition it is difficult to see how that interpretation would work in practise. If s 44 limited the period of permissible adjournments to a total of 14 days, how would that period be assessed? Would necessary breaks in the proceedings to allow for weekends or Easter or Christmas be included in the calculation of the 14 days? What if breaks of one or two days mid-trial were caused by the need for the court to deal with other matters or to allow for the attendance of an otherwise unavailable witness such as occurred in the present case? It is most unlikely that the legislature intended that the Family Matters Court be precluded from granting adjournments of this necessary kind in the course of a hearing simply because the accumulated total of the periods of adjournment exceeded 14 days.

[26] Whilst the legislation does provide for time limits and seeks to ensure that proceedings are pursued expeditiously, it does not do so at the expense of the welfare of the child. The Act does not impose any absolute or overall

time limit upon proceedings. Had that been intended a time limit could easily have been provided in s 40 or elsewhere in the Act.

[27] The primary purpose of the legislation is to provide for the protection and care of children and that purpose must be borne in mind in interpreting the operational provisions of the Act. There are many reasons why a matter may need to be adjourned and adjourned again during the course of a hearing. There are many reasons why necessary adjournments may exceed 14 days overall. The pressure of the business of the court, illness on the part of the presiding officer, the unavailability of a witness, the need to obtain further reports, the failure of previously ordered reports to be prepared in time, the need to have the child medically examined, the need (as in this case) to provide the parties with time to present detailed written submissions in complex cases and many other reasons may all mean that it is impractical, if not impossible, for the matter to be returned to the court for finalisation within 14 days. It cannot have been the intention of the legislature that so soon as the total period of adjournments exceeded 14 days, no matter what the cause, there would be a cessation of the proceedings with the consequences for which the plaintiff contends. The alternative would be that the parties would be forced to embark upon a hearing or continued hearing in quite unsatisfactory and, possibly, unfair circumstances in order to comply with rigid time constraints. Whilst it is clear that the intention of the legislative scheme is that proceedings be resolved expeditiously, there is no suggestion that necessary delays should

have the consequences suggested. Further, it cannot have been the intention of the legislature that if the matter had been adjourned for a total period longer than 14 days the subject child would automatically be returned to his or her parent. If that parent was violent, a sexual predator or for some other reason unfit to care for the child, the primary purpose of the legislation would be defeated by such an approach.

[28] The intention of the legislature is, in my view, to permit the making of interim orders in order to govern the situation of the child pending the hearing of the matter. As Mildren J observed in *Minister for Territory Health Services v LG* (supra) that may occur when the court has not embarked upon a hearing of the application. Once the hearing is underway the matter may be adjourned as often as is necessary, for periods not exceeding 14 days on any one occasion, pending finalisation of the hearing.

[29] Counsel commented upon the unsatisfactory nature of the legislation. Whatever interpretation is adopted, the Act is deficient in not addressing the relationship between s 44 and s 47. The provisions are separate but also potentially overlap. Further, the Act fails to identify the consequences (if any) that flow from a failure to comply with the time limits. What is to happen after the operation of an interim order granted pursuant to s 47 of the Act exceeds the time limit of four months from the making of the first interim order? What is to follow if a court adjourns the hearing of an application for a period which is, in effect, in excess of 14 days? Whilst the courts can strive to fill the apparent lacuna and provide answers it would be

sensible for the legislation to spell out what is intended. This legislation needs to be revisited by the legislature.

[30] The summons is dismissed.

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